

ORIGINAL

**M I L L E R   &   V A N   E A T O N** **EX PARTE OR LATE FILED**  
**P. L. L. C.**

MATTHEW C. AMES  
FREDERICK E. ELLROD III  
MARCI L. FRISCHKORN\*  
WILLIAM L. LOWERY

\*Admitted to Practice in  
Virginia Only

Incorporating the Practice of  
Miller & Holbrooke

1155 CONNECTICUT AVENUE N.W.  
SUITE 1000  
WASHINGTON, D.C. 20036-4306  
TELEPHONE (202) 785-0600  
FAX (202) 785-1234

**MILLER & VAN EATON, L.L.P.**  
155 MONTGOMERY STREET  
SUITE 1410  
SAN FRANCISCO, CALIFORNIA 94104  
TELEPHONE (415) 772-8127  
FAX (415) 434-2852

WWW.MILLERVANEATON.COM

WILLIAM R. MALONE  
NICHOLAS P. MILLER  
CHRISTIAN S. NA\*\*  
JOSEPH VAN EATON

\*\*Admitted to Practice in  
Massachusetts only

November 24, 1999

**Via Hand Delivery**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**RECEIVED**

NOV 24 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in WT Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submit this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding.

On November 23, 1999, the following representatives of the Real Estate Alliance met with Christopher Wright, Jane Halprin and Joel Kaufmann of the Office of the General Counsel:

Gerard Lavery Lederer	Building Owners and Managers Association, International
Michael Carvin	Cooper, Carvin & Rosenthal;
Matthew C. Ames	Miller & Van Eaton, P.L.L.C.; and
Nicholas P. Miller	Miller & Van Eaton, P.L.L.C.

The meeting addressed access to buildings by telecommunications providers. The attached written ex parte presentation, which was given to the Commission staff at the meeting, summarizes the matters that were discussed in the meeting. Mr. Wright was also given a copy of the comments and reply comments filed by the Real Access Alliance.

No. of Copies rec'd 0+1  
List ABCDE

No. of Copies rec'd \_\_\_\_\_  
List ABCDE

**MILLER & VAN EATON, P.L.L.C.**


- 2 -

Please contact the undersigned with any questions.

Very truly yours,

**Miller & Van Eaton, P.L.L.C.**

By

  
Matthew C. Ames

cc: Chirstopher Wright, Esq.  
Jane Halprin, Esq.  
Joel Kaufmann, Esq.

7379\70\MCA00398.DOC

## **REGULATION OF BUILDING ACCESS IS UNNECESSARY AND THE COMMISSION HAS NO AUTHORITY TO ADOPT SUCH REGULATIONS**

- **Regulation Is Unnecessary Because the Market Is Working.**

- The CLECs themselves admit that they are rarely denied access, and have not identified building access as a material risk factor in their securities filings.
- The CLEC industry has grown enormously in a short time without regulation of building access.
- Real estate is a highly competitive market: owners grant access because they recognize value of providing tenants with telecommunications options. CLEC anecdotes are not evidence of market failure, but of the market working.
- Based on the record before the Commission, it would be an abuse of the Commission's discretion to regulate access to buildings. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).
- Why extend regulation to an unregulated sector of the economy?

- **The Commission Has No Jurisdiction or Authority Over Building Owners.**

- The Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity or might have an incidental effect on a regulated activity. See *Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7<sup>th</sup> Cir. 1972).
- Building owners as such are not engaged in communications by wire or radio.
- Even if the Commission has jurisdiction over wiring owned by building owners, it has no authority to act against building owners because no provision of the Act confers such authority. The Commission has acknowledged that building owners are not subject to its "regulatory scrutiny." *Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network*, CC Docket No. 81-216, *First Report and Order*, 97 FCC 2d 527 (1986) at ¶ 14.
- The Commission's ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973); *Illinois Citizens Committee*, 467 F.2d at 1400.

- **The Commission Has No Authority To Impose Public Utility Style Regulation of Building Access, Even if such Regulation Were Justified.**

- The Commission is not empowered to enforce the antitrust laws, except with relation to Title III licensees. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); Communications Act, §§ 313, 314.
- The Federal Trade Commission has recognized that building owners do not have market power. *Premier Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (March 28, 1996). Building owners compete directly for tenants with other owners and must meet their needs to succeed.

- Tenants are not “locked in.” Every year, approximately 20% of office tenants and over a third of apartment residents move.
- **Section 224 Does Not Apply to Facilities Located Inside Buildings.**
  - Section 224 was never intended to include access to buildings, and has never been interpreted to do so.
  - Building owners, and not utilities, own and control ducts and conduits inside their buildings.
  - Utility access rights inside buildings are not rights-of-way because they typically take the form of licenses and leases. Although easements may sometimes constitute rights-of-way, licenses and leases do not.
  - In any event, utility access rights are defined by state law, and the Commission cannot alter existing property rights.
  - Because of the enormous variety in the terms of access rights, the Commission cannot effectively use Section 224 to achieve its policy goal.
- **Any Attempt To Impose an Access Requirement Would Violate the Fifth Amendment.**
  - Any nondiscriminatory access requirement effects a *per se* physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Gulf Power Co. v. United States*, No. 98-2403, 1999 U.S. App. LEXIS 21574 (11<sup>th</sup> Cir. Sept. 9, 1999).
  - The Commission cannot adopt a rule that effects a taking without express authority from Congress. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not given the Commission general authority to effect takings, nor has it authorized the Commission to establish a mechanism to compensate building owners for property occupied by CLECs.
  - The Commission cannot expand utility access rights under Section 224 without effecting a taking in a large number of cases.
  - Even the CLECs acknowledge that in certain cases a forced access requirement may constitute a regulatory taking, because owners have investment-backed expectations.
- **The Commission Cannot Extend the OTARD Rules to Common Areas and Nonvideo Services.**
  - The current OTARD rules are invalid because Section 207 was merely a directive to use existing authority to preempt certain governmental and quasi-governmental restrictions, and the Commission has no authority over building owners. For the same reason, the Commission cannot extend the rules to nonvideo services.
  - The Commission has correctly recognized that to extend the rules to common areas and restricted use areas would violate the Fifth Amendment.

The pole attachment policies and practices of utilities owning or controlling poles are generally unregulated at the present time. Currently only one State—Connecticut—actually regulates pole attachment arrangements, while in another eight States, regulatory authority apparently exists but has not been exercised—California, Hawaii, Nevada, Alaska, Rhode Island, Vermont, New Jersey, and New York. According to a recent survey conducted by the Commission's Cable Television Bureau, entitled "Cable Television Pole Attachment—State Law and Court Cases," very few States have specific statutory provisions governing attachments to utility poles. Only 15 States, including the District of Columbia, appear to have enacted statutory authority which may be of sufficient breadth to permit regulation by an appropriate State body.

#### JURISDICTIONAL BASIS FOR FCC REGULATION

Moreover, the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. (*California Water and Telephone Co., et al.*, 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority. The Commission reasoned:

\* The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

In addition the Commission concluded that there was no reason to separate resolution of the purely legal question of jurisdiction on the basis of whether the party owning or controlling the pole was a telephone or nontelephone company.

The committee believes that S. 1547, as reported, will resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions.

The committee believes that Federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.

The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept of S. 1547, as reported, is to assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

S. 1547, as reported, stops short of declaring the provision of pole space to CATV "wire or radio communications" per se, or that poles constitute "instrumentalities, facilities, apparatus," et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153(a)). However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for CATV pole attachments are just and reasonable in any particular case.

Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or

controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.

It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant. CATV industry representatives estimate that about 15 percent of all utility poles owned or controlled by electric power companies are not occupied by telephone companies as well, and that CATV systems are already attached to a high percentage of these power poles in communities served by cable television.

While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction.

Furthermore, S. 1547, as reported, would not require the Commission, as it stated in its *California Water and Telephone Co.* decision, noted above, "to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

#### STATE OR LOCAL CATV POLE ATTACHMENT REGULATION

S. 1547, as reported, permits any State which regulates the rates, terms, and conditions for CATV pole attachments to preempt the Federal Communications Commission's regulation of pole attachments in that State. The committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State

or local regulation currently does not widely exist that Federal supplemental regulation is justified.

However, the framework for such State and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or State regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

Nevertheless, in the absence of regulation by these State and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis. The committee looks to a replacement of interim FCC jurisdiction by the States and localities concerned with the orderly growth of cable television. Since this is a relatively novel issue in many States, there will be a time before many assert CATV pole attachment jurisdiction. Most States will require special legislation in order to empower their utility commissions with the requisite authority. Some States may wish to conduct studies of local needs prior to considering legislative action. There is, too, the possibility that some States may not choose to regulate in this area.

S. 1547, as reported, establishes a simple notification process whereby a State may recapture CATV pole attachment jurisdiction by certifying to the Commission that it regulates the rates, terms, and conditions for CATV pole attachments. The bill as reported makes clear that the Commission shall be foreclosed from regulation with respect to pole attachments in any State which has so certified to the Commission. Receipt of such a certification from the State shall be conclusive upon the Commission. The FCC shall defer to any State regulatory program operating under color of State law, even if debate or litigation at the State level is in progress as to the authority of the State or local body to carry out a CATV pole attachment regulatory program. However, since the purpose of the bill as reported is to create a forum that is, in fact, available to adjudicate pole attachment disputes, State preemption of FCC jurisdiction would not occur if a State only had authority to regulate in this area but was not actually implementing that authority. Thus, if a State is regulating, or is prepared to regulate upon a proper request, the FCC is preempted. Litigation challenging the State's authority would not affect that preemption unless the reviewing court or other authority had imposed a stay of State regulation pending outcome of the litigation.

S. 1547, as reported, unlike the bill as introduced, imposes no rate-setting formula upon the States. The committee believes that the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities. The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities

5/6/64  
155 to  
Paul  
Lorenson